LEE BOON HOOI, RE: EX P; TAN KET HUAT

HIGH COURT MALAYA, SHAH ALAM
MAHADEV SHANKAR J
[BANKRUPTCY NO. 29-1234-1990]
1 APRIL 1992

BANKRUPTCY: *Rule 101, 102 of Bankruptcy Rules - Whether Court has power to allow filing of fresh affidavit to verify the bankruptcy petition where the earlier affidavit was affirmed before attestation - Whether the Court has the power to do so - Whether bankruptcy petition should be attested before affirmation - Whether non-compliance makes the proceedings a nullity - Whether defects curable - Section 3(1) Bankruptcy Act - When judgment debtor commits an act of bankruptcy.*

The petitioning creditor had obtained a judgment on 11 January 1989. On 21 September 1990 a bankruptcy notice valid till 20 December 1990 was issued. After three unsuccessful attempts to effect personal service, the petitioning creditor's solicitors applied and obtained an extension of validity of the notice for six months and an order for substituted service. The Petition was advertised and posted on the Court notice Board. The bankruptcy notice was deemed served twelve days after, that is, 18 February 1991, having fulfilled the four conditions set out in ss. 5(1)(a) to (d) of the Bankruptcy Act. The bankruptcy petition was filed on 19 March 1991. In accordance with the practice the date of presentation and hearing of the petition were left blank for the Court to fill. These dates were 19 March 1991 and 4 September 1991 respectively.

Owing to the volume of work the petition was registered on 2 May 1991. The petitioning creditor affirmed the affidavit of truth of statements in the petition on 18 March 1991. When the matter came up in open Court for disposal, it was pointed out that the petition had been affirmed before it was filed. The Counsel for the petitioning creditor sought to rectify the matter by asking for leave to file a fresh affidavit verifying the matters alleged in the petition.The issue was whether the Court has power to allow the filing of a fresh affidavit to verify the contents of the bankruptcy petition where the earlier affidavit was affirmed before it was filed. And if so, whether such powers should be exercised in this case.

Held:

[1] Affirmation of the bankruptcy petition appeared to have preceded the attestation. It should have been attested before affirmation in compliance with rr. 101 and 102 of Bankruptcy Rules.

[2] The date of the act of bankruptcy was wrongly dated. It should have been 26 February 1991 and not 11 February 1991. This is really a simple process of calculation (that is seven days after service of notice).

[3] The two errors stated above were curable errors. English and Commonwealth authorities before 1963 which took a very stringent approach to non-compliance especially with reference to treating proceedings taken as a nothing or nullity must be viewed with some caution. The modern approach dispenses with the distinction between a nullity and mere irregularity and see whether rectification could result in a failure of justice.

[4] Rule 274 provided the Court with the power to amend or otherwise deal with any proceeding which does not comply with the rules. Therefore the petitioning creditor was ordered to file a fresh affidavit to verify the petition and the date of the act of bankruptcy was to be amended to 26 February 1991.

[Leave to file further affidavit granted.]

Cases referred to:
Sobri bin Arshad v. Associated Tractors Sdn. Bhd. [1991] 3 CLJ (Rep) 756 ***(not foll)***
Chin Yoon Timber Co. v. Overseas Lumber Bhd. [1978] 2 MLJ 172 ***(cit)***
Sam Hin Timber Trading Co. v. Perusahaan Sri Duyong Sdn. Bhd. [1983] CLJ (Rep) 838 ***(cit)***
Sari Atlantic Sdn. Bhd. v. Aik Kum Enterprise [1988] 1 MLJ 201 ***(cit)***
Re Pritchard [1963] Ch 502 ***(cit)***
Harkness v. Bell's Asbestos & Engineering Ltd. [1967] 2 QB 729 ***(cit)***

Legislation referred to:
Bankruptcy Act 1967 (Revised 1988), ss. 3(1), 5(1)(a), (b), (c), (d)
Bankruptcy Rules 1969, rr. 101, 102, 108
Companies (Winding-up) Rules 1972, r. 26
Rules of the High Court 1980, O. 2

For the judgment debtor - P.Y. Cheng; M/s. C.K. Tan & Co.

JUDGMENT

Mahadev Shankar J:

The issue here is whether this Court has the power to allow a petitioning creditor to file a further affidavit verifying the contents of a bankruptcy petition where the first affidavit was affirmed before the petition was actually filed. If so whether such power should be exercised in this case.

The petitioning creditor (Tan) obtained a judgment against Lee Boon Hooi and Lee Boon Ming for RM1,500 general damages and RM14,585 for special damages and RM463.50 costs on 11 January 1989. The defendants were represented by solicitors in that suit but the solicitors absented themselves when judgment was given and again when damages were assessed.

Not a cent was paid. On 21 September 1990 a bankruptcy notice valid till 20 December 1990 was issued by this Court against Lee Boon Hooi (hereafter referred to as the judgment debtor). Three unsuccessful attempts were made in November 1990 to effect personal service on the judgment debtor at his residence in Kedah. So Tan's solicitors applied for and obtained an extension of the validity of the notice for six months from the date of expiry and an order for substituted service. The petition was advertised in *the Star* on 4 February 1991 and posted on the Court notice Board on 5 February 1991. In accordance with the order the bankruptcy notice was deemed served twelve days later that is 18 February 1991.

By s. 3(1) of the Bankruptcy Act (the Act) the judgment debtor committed an act of bankruptcy when he did not, within seven days after service of the notice, comply with the requirements of the notice or satisfy the Court that he had a cross demand which equalled or exceeded the judgment debt.

Section 5(1)(a) to (d) of the Act sets out four conditions which must be fulfilled before a creditor can present a bankruptcy petition. Every one of these conditions was satisfied, when, on 19 March 1991, Tan's solicitors paid a deposit of RM300 to the Official Assignee and filed this petition. Tan had signed the petition in the presence of his solicitor. In accordance with the practice in this Registry the date of the presentation of the petition and the date of hearing was left blank for the Court to fill in. These dates were 19 March 1991 and 4 September 1991 respectively. Owing to the volume of work here the petition was actually registered only on 2 May 1991 and sealed by this Court. Tan however affirmed the affidavit of truth of the statements in the petition on 18 March 1991, before a Commissioner for Oaths.

The necessity for this affidavit be it noted is not provided for by the Act, but by r. 106 of the Bankruptcy Rules (the Rules) which merely says:

> A creditor's petition shall be verified by affidavit.

Nowhere in the Rules is there any specific reference as to when this affidavit has to be affirmed.

Once again an unsuccessful attempt was made to effect personal service and an order of substituted service obtained on 17 September 1991. Copies of the petition were posted on the Court notice Board and advertised in *the Star*. Service was deemed effected on 25 October 1991. That same day service of the cause papers in the bankruptcy was effected on the Official Assignee.

The matter then came up in Open Court for disposal on 25 March 1992. Be it noted that the judgment debt. still remained unsatisfied. The judgment debtor was not challenging the petition, nor did he appear.

When it was pointed out that the petition had been affirmed before it had been filed, Counsel sought to rectify the matter by asking for leave to file a fresh affidavit verifying the matters alleged in the petition.

Referring to *Sobri bin Arshad v. Associated Tractors Sdn. Bhd.* [1991] 3 CLJ (Rep) 756 it was suggested that Counsel's application to file a fresh affidavit verifying the existing petition should be refused and that the only way to remedy the position was to dismiss the Petition with liberty to file afresh.

I adjourned Court to consider the matter further. The opinion of this Court now follows.

It will be useful if at the outset we keep in the forefront of our minds that r. 26 of the Companies (Winding-up) Rules 1972 is radically different from the corresponding provision in the Bankruptcy Rules. It reads:

> **26. Verification of petition**
>
> Every petition for the winding-up of a company by the Court shall be verified by an affidavit referring thereto.The affidavit in Form 7 shall be made by the petitioner or by one of the petitioners, if more than one, or, in case the petition is presented by a corporation, by some director, secretary or other principal officer thereof, and shall be sworn after and filed within four days after the petition is presented, and the affidavit shall be *prima facie* evidence of the statements in the petition.

At the risk of repetition let it be stated that this Rule specifically lays down that the affidavit verifying the petition for winding-up must be sworn **after** the petition is presented, and **filed** within four days thereafter.

Chin Yoon Timber Co. v. Overseas Lumber Bhd. [1978] 2 MLJ 172 concerned this r. 26. It was not followed in *Sam Hin Timber Trading Co. v. Perusahaan Sri Duyong Sdn. Bhd.* [1983] CLJ (Rep) 838 and *Sari Atlantic Sdn. Bhd. v. Aik Kum Enterprise* [1988] 1 MLJ 201. With due respect to all concerned since the *Sam Hin Timber Trading Co.* case was cited to Lim Beng Choon J he would have noted the *Chin Yoon Timber* Case and preferred to follow Peh Swee Chin J.

Sobri bin Arshad dealt specifically with a bankruptcy petition. The crux of this judgment is that since a bankruptcy petition has no legal existence until it is presented it can only be affirmed thereafter. I do not agree.

With the greatest respect I would draw the kind attention of all concerned to rr. 101 and 102 of Bankruptcy Rules. Remembering that the Court file would already have been opened when the Request for the bankruptcy notice was made, these Rules clearly envisage the coming into being of the petition as soon as it is ready for attestation as required by r. 102. In the context of this rule that means it must be witnessed. This is usually done by the petitioning Creditors' solicitor. It is this act of attestation which completes the petition and makes it a creditor's petition ready for presentation under the Act after it has been duly affirmed.

The sequence of events provided by the Rules makes it imperative for the affidavit verifying the petition to be affirmed **AFTER** the petition has been attested, and not as in a winding-up only after it has been presented.

I am firmly of the view that the affirmation of this affidavit shortly before the petition is filed but after it has been duly attested is permissible, and well within the scope of the Act and the Rules. It is also practical, convenient and saves expense because all the required documents can be filed simultaneously and thereafter taken at one go by the Registry.

In this context it may be worth bearing in mind that all the conditions to be fulfilled as provided by s. 5(1)(a) to (d) of the Act relate to facts which are antecedent to the attestation of the petition and its consequent affirmation. After it has been presented (that is filed) r. 108 provides that it cannot be sealed for service until it has been investigated by the Registrar. Theoretically the Registrar should do this inmediately after the petition is presented so the affidavit verifying the petition should accompany it. To interpose an additional burden upon the judgment creditor requiring him to attend Court after presentation and file the verification affidavit, before investigation will add to costs and expense which does not serve any useful purpose.

In the case before me there were two items on which the Rules were not complied with. Firstly the affirmation appears to have preceded the attestation. For future guidance solicitors should take care to attest **BEFORE** affirmation. Secondly the date of the act of bankruptcy was wrongly stated. This is really a simple process of calculation. It should have been 26 February 1991 and not 11 February 1991.

English or Commonwealth authorities decided before 1963 which took a very stringent approach to non-compliance especially with reference to treating proceedings taken as a "nothing" or nullity must be viewed with some caution. See *Re Pritchard decd* [1963] Ch 502 and C/f *Harkness v. Bell's Asbestos & Engineering Ltd.* [1967] 2 QB 729. The modern approach is to do away with the distinction between a nullity and mere irregularity and see whether rectification could result in a failure of justice.

Whilst the Rules of the High Court do not apply in bankruptcy proceedings (See r. 176) the effect of O. 2 of the Rules of the High Court is provided for in rr. 274 and 275 which read as follows:

> **274. Effect of non-compliance with Rules.**
>
> Non-compliance with any of these Rules or with any rule of practice for the time being in force shall not render any proceeding void unless the Court shall so direct but such proceeding may be set aside either wholly or in part as irregular or amended or otherwise dealt with in such manner and upon such terms as the Court may think fit.
>
> **275. Abridgment or enlargement of time.**
>
> The Court may under special circumstances and for, good cause shown extend or abridge the time appointed by these Rules or fixed by any order of the Court for doing any act or taking any proceedings.

In all the circumstances of this case I hold that the two errors in this bankruptcy petition were curable errors. There is no doubt whatsoever in the mind of this Court that the act of bankruptcy did occur on 26 February 1991 and that the petitioning creditor was entitled to rely upon it.

It is no part of this Court's function to run up costs and cause further delays by compelling parties to go back to square one when a simple rectification of a mere irregularity would serve the ends of justice. Rule 274 gives this Court the power to amend **or otherwise deal** with any proceeding which does not comply with the rules.

My order is that a fresh affidavit verifying the petition be filed and the date of the act of bankruptcy be amended to 26 February 1991. I dispense with the service of this fresh affidavit.

There will now be a receiving and adjudication order against the petitioner as prayed, and costs which shall exclude the costs of the fresh affidavit aforesaid.

Also found at [1992] 4 CLJ 1903